A **SALING LAU BEE CHIANG & ORS**

v.

KANAWAGI SEPERUMANIAM & ORS

B HIGH COURT MALAYA, JOHOR BAHRU
VERNON ONG LAM KIAT JC
[CIVIL SUIT NO: (MT-1) 22-228-2009]
29 OCTOBER 2009

C ***TRUSTS:*** *Trusts - Receiver and manager, application for appointment - Whether requirements for appointment satisfied - Whether trust property in jeopardy - Whether also application for injunction to restrain trust assets from being dissipated allowed*

D The plaintiffs applied for the appointment of a receiver and manager (R&M) to receive and manage the assets of the Linggiu Valley Orang Asli Trust and the sums awarded under a High Court judgment. They also applied for an injunction to restrain the defendants from dissipating the trust assets and the judgment sum. The defendants, on the other hand, applied to set aside the R&M E order and the injunction order that was obtained *ex parte* and also for stay of the said orders.

Held (allowing the plaintiffs' application and dismissing the defendants' application):

F

(1) For the appointment of R&M, the applicant must satisfy that (i) there was a good *prima facie* claim of title by the plaintiffs; and (ii) the property was in jeopardy or the plaintiffs would be in a worse off position if appointment of R&M was delayed. G The plaintiffs satisfied the first and second requirements as they were the beneficiaries of the trust and the facts showed that the trust property was in jeopardy. Further, following the appointment of the R&M through the *ex parte* order, more pertinent information emerged which indicated that the trust H property was in jeopardy and which justified the injunction restraining the defendants from dissipating the trust funds. (paras 9, 10, 11 & 12)

(2) The facts pointed to the mismanagement of the trust by the I defendants. There was a lack of accountability and proper keeping of records. It appeared that the trust was run without any proper supervision and control. The situation was clearly undesirable as the trustees of a trust were acting in a fiduciary

capacity. The conduct of the defendants in refusing to cooperate with the court appointed R&M *via* the *ex parte* order was inexcusable. The trust was for the benefit of all the beneficiaries. In discharging their duties as trustees, the defendants were bound by the high standards of duty of care but that was not the case herein. The defendants had engaged in self-dealing. On the whole of the evidence adduced, there was a real risk that the trust property was in jeopardy. (para 32)

Case(s) referred to:
Cummins v. Perkins [1899] 1 Ch D 16 ***(refd)***
Federal Transport Service Co Ltd & Ors v. Abdul Malik & Ors [1973] 1 LNS 28 HC ***(refd)***
Lim Poh Choo v. Absolute Ascend Sdn Bhd [2008] 7 CLJ 810 HC ***(refd)***
Matang Holdings Bhd v. Dato Lee San Choon & Ors [1985] 1 LNS 42 HC ***(refd)***
Setapak Tin Syndicate Ltd & Anor v. Choo Kim Peng [1947] 1 LNS 98 HC ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, s. 25(2)
Legal Profession Act 1976, s. 94
Rules of the High Court 1980, O. 29 r. 2, O. 30 r. 1,
Specific Relief Act 1950, s. 43
Trustee Act 1949, s. 4(1)

For the plaintiffs - Christopher Leong (G Ragumaren & Shamala Balasundaram with him); M/s G Ragumaren & Co
For the defendants - Malik Imtiaz (Riza Makhzan Arifin with him); M/s Sharifah & Assocs

Reported by Usha Thiagarajah

JUDGMENT

Vernon Ong Lam Kiat JC:

[1] There are four applications before the court. Enclosure 6 is the plaintiff's application for the appointment of a receiver and manager to receive and manage the assets of the Linggiu Valley Orang Asli (Jakuns) Trust ('the trust') and the sums awarded under a judgment awarded in Johor Bahru High Court O.S. Suit No. 24.828.1994 as varied by order of the Court of Appeal in Civil Appeal No. J-01-65-1997 ('the judgment sum'). Enclosure 7 is the

plaintiffs' application for an injunction to restrain the defendants from disposing of, dissipating or diminishing the assets constituting the trust and the judgment sum. Enclosure 15 is the defendants' application to set aside the R&M Order and the Injunction Order obtained *ex parte*. Enclosure 16 is the defendant's application for a stay of the *ex parte* R&M Order and the Injunction Order.

Background Facts

[2] The plaintiffs are Orang Asli who are beneficiaries of a trust and trust funds. In or about 1994, Orang Asli living in the villages of Kampung Sayong Pinang, Kampung Pasir Assam (Pasar Intan) and Kampung Semmangar Dalam (in the Sungai Linggiu catchment area) were deprived of their land by the Johore State Government for the purposes of the construction of a dam through an agreement with the Government of Singapore. 52 of the Orang Asli ('the 52 Orang Asli') decided to sue the Johore State Government for compensation.

[3] The 1st defendant, through his law firm, the 4th defendant, acted for the 52 Orang Asli in their claim for compensation in Johor Bahru High Court Originating Summons Suit No. 24.828.1994 ('the JB 828 Suit'). The 52 Orang Asli obtained judgment on 19 December 1995 for the sum of RM26,500,000 ('the Compensation'). The Johor State Government's appeal was dismissed by the Court of Appeal on 19 November 1997. The matter was remitted to the Johor Bahru High Court to decide in the JB 828 Suit on the terms and mechanics of the payment of the compensation to the 52 Orang Asli.

[4] On 5 June 2000 the Johor Bahru High Court made an order ('the trust order') *inter alia* as follows:

(i) the Johor State Government pay the Compensation together with interest accrued amounting to RM38,554,111.92 ('the judgment sum');

(ii) RM22m from the judgment sum be paid into a trust account and a trust be established under the name of the Linggiu Valley Orang Asli (Jakuns) Trust ('the trust');

(iii) that Adong bin Kuway (Batin) (the 2nd defendant), Abdul Rahman bin Abdullah (Batin, now deceased) and the 1st defendant be appointed the first trustees, and who shall execute the trust deed;

(iv) the Director General of Jabatan Hal Ehwal Orang Asli, Malaysia, Kuala Lumpur for the time being shall be appointed the additional trustee of the trust;

(v) the balance of the judgment sum (amounting to RM16,554,111.92) was to be handed to the 4th defendant who shall distribute the said sum to the 52 Orang Asli after deduction and payment of legal fees, costs, consultation fees and expenses incurred; and

(vi) the trustees do have liberty to apply in relation to the implementation of the trust and the performance of their duties under the trust.

[5] A trust deed dated 5 June 2000 ('the trust deed') was created governing the terms relating to RM22m. On 5 July 2000 the Johor State Government paid RM22m to the 4th defendant. On 13 July 2000 the Johor State Government paid RM16,554,111.92 to the 4th defendant.

[6] The plaintiffs are beneficiaries to the trust. They are suing the defendants for the following:

(a) as against the 1st and 2nd defendants, for various breaches of trust;

(b) as against the 1st and 4th defendant, for breach of the constructive trust relating to the balance sum of RM16,554,111.92;

(c) as against the 3rd defendant, for knowing receipt of trust funds.

[7] On 17 April 2009 the court granted *ex parte* orders in respect of encl. 6 and 7. On 5 May 2009, after hearing submissions of parties the court granted ad interim orders in respect of encls. 6 and 7 until the disposal of the same. On 7 September 2009 the court heard submissions of the plaintiffs hereto and reserved decision. On 11 September 2009 the court made the following orders:

(i) Enclosure 16 is struck out with no order as to costs;

(ii) Order in terms of encl. 6;

(iii) Order in terms of prayer (2) as amended and (3) of encl. 7.; and

(iv) Enclosure 15 is dismissed with costs.

Findings Of The Court

Enclosure 16

[8] On 7 September 2009 counsel for the defendants applied to withdraw encl. 16 as it had become academic. Enclosure 16 was subsequently struck out with no order as to costs.

Enclosure 6, 7 & 15

[9] The court's power to appoint interim Receiver and Manager (R&M) to preserve property pending determination of a suit is provided under s. 25(2) of the Courts of Judicature Act 1964 (item 6 of the Schedule), s. 43 of the Specific Relief Act 1950 and under O. 30 r. 1 and O. 29 r. 2 of the Rules of the High Court 1980 (see also *Cummins v. Perkins* [1899] 1 Ch D 16 at 20 per Lindley MR). The test for the appointment of a R&M is well established (*Matang Holdings Bhd v. Dato Lee San Choon & Ors* [1985] 1 LNS 42; *Setapak Tin Syndicate Ltd & Anor v. Choo Kim Peng* [1947] 1 LNS 98; *Lim Poh Choo v. Absolute Ascend Sdn Bhd* [2008] 7 CLJ 810; *Federal Transport Service Co. Ltd & Ors v. Abdul Malik & Ors* [1973] 1 LNS 28). The applicant must satisfy the court that:

(i) there is a good *prima facie* claim of title by the plaintiffs; and

(ii) the property is in jeopardy or the plaintiffs would be in a worse off position if appointment of a receiver is delayed.

Condition (i)

[10] The plaintiffs are the beneficiaries of the trust. They are also the beneficiaries of the RM16,554,111.92 under a constructive trust ('the Constructive Trust Sum'). The first condition is satisfied.

Condition (ii)

[11] The trust property is in jeopardy by reason of the following:

(a) The defendants breached the express order of court dated 5 June 2000 requiring the appointment of the Director General of Jabatan Hal Ehwal Orang Asli as a trustee.

(b) The 1st and 2nd defendants' refusal and failure to render accounts and information regarding the trust and the Constructive Trust Sum despite the plaintiffs' repeated requests in 2004 till 2007.

(c) In breach of the court order dated 4 April 2006 requiring the defendants to produce certified accounts as required by the trust deed, the 1st and 2nd defendants only produced unaudited/ uncertified statements.

(d) Between 2000 and 2006, the unaudited statements show that RM5,511,457 was paid to the beneficiaries. Of this sum RM2,716,920 was said to be given to the Tok Batins for distribution to the beneficiaries; this cannot be ascertained as the individual payment vouchers were not sighted.

(e) In breach of cl. 8.1 of the trust deed the financial statements fail to set out the amounts distributed by the trustees to each beneficiary. No details of legal fees, costs, consultant fees and other expenses are provided in the financial statements.

(f) Trustees making unauthorised one-off payment of RM2,500 each to the 52 Orang Asli.

(g) The 4th defendant refused to give an account of what happened to the Constructive Trust Sum. The 1st defendant was quoted from a Malaysiakini article dated 9 July 2004 as saying that he had distributed RM3.6m to the Tok Batins, RM10.2m as legal fees, RM2.2m paid to one Hamzah, who is neither a beneficiary or solicitor. There is no discernible reason for RM3.6m to be paid to the Tok Batins. The sum of RM10.2m paid for legal fees is extraordinary and unusual. The purported payment of RM2.2m to Hamzah as introduction fee is in breach of s. 94 of the Legal Profession Act 1976.

[12] Following the appointment of the R&M through the *ex parte* order dated 17 April 2009, more pertinent information have emerged which indicates that the trust property is in jeopardy and which justifies the injunction restraining the defendants from dissipating the trust funds. The information is contained in the reports of the R&M which sets out the current state of affairs of the trust and the Constructive Trust Sum.

Information Of Trust Fund And Constructive Trust Sum

[13] When the 1st defendant was approached by the R&M on 24 April 2009 he wrote down the location of the trust funds as follows:

A – RM15m in Amanah Raya Berhad, KL ('ARB account');

– Transit monies in Agro Bank, KL;

– 27 units of condominiums at the Gurney Heights project leased to Virgin Properties Sdn Bhd;

B

– Trust records were kept at Hamzah's house in Petrijaya, Kota Tinggi, Johor.

Assets Of The Trust – RM15m With ARB

C **[14]** The ARB account was opened in October 2005 with RM22m of the trust funds. The ARB account was held under the wrong name – the 4th defendant was described as the beneficiary of the account. The R&M has since rectified the situation.

D **[15]** The defendants have refused to account for the accumulated surplus from 2000 to 2005 amounting to over RM2m.

[16] ARB gave a loan to the trustees of the trust of RM100,00 to pay legal fees. There is no documents to indicate what the E RM100,000 legal fees payment is for. Despite repeated request for clarification no explanation has been forthcoming.

[17] The amount transferred from the ARB account to the Agro Bank KL account is in excess of that required to make the monthly payments to the beneficiaries. Between Oct 2005 and April 2009 F there is a surplus of RM1,106,881.06. This surplus has not been accounted for.

[18] There are also unexplained cash withdrawals from the Agro Bank KL account between 12 May 2008 to 9 April 2009 amounting G to RM435,451.18. The defendants have refused to give any explanation despite the R&M's letter dated 30 April 2009.

[19] The circumstances surrounding the disclosure of the payments to one Noor Hayati binti Ta since January 2009 which leaves many H questions unanswered.

[20] The R&M discovered another account in Agro Bank KL opened in June 2005. The defendants have refused to provide particulars on the monies paid into the account and withdrawn between 28 April 2008 to 28 April 2009. I

Assets Of The Trust – The 27 Condominium Units

[21] Of the RM22m deposited in the ARB account the 1st defendant invested RM7m in the purchase of 27 units of condominiums from Delta Odyssey Sdn Bhd ('DOSB') and these properties were then leased to Virgin Properties Sdn Bhd ('VPSB').

[22] DOSB is a company in receivership. The 27 units of condominium are part of a development in which the developer Mampu Jaya Sdn Bhd ('MJSB') is also in receivership.

[23] The purchase also benefited the 1st defendant and his son, Dinesh Kanawagi (a partner of the 4th defendant) because the 1st defendant and Dinesh Kanawagi are shareholders of VPSB; and where Dinesh Kanawagi is a director.

[24] The 27 properties were purchased in the 1st defendant's name. Consequently, the receiver and manager of DOSB have refused to deal with the R&M on the basis that DOSB as vendor entered into the 27 sale and purchase agreements with the 1st defendant alone and not with the trust. The defendants have refused to produce the original sale and purchase agreements and the deeds of receipt and reassignment for the said properties. There are also issues relating to the ownership putting the 27 properties in jeopardy as the question whether or not the Trust will be able to secure 27 properties for itself.

[25] The lease agreement with VPSB is also in question. This scheme appears to have benefited the 1st defendant and his son. The 1st defendant and his son hold 49% of the shares in VPSB. This is an instance of self-dealing by the 1st defendant as trustee of the trust. The terms of the lease agreement appear to be one-sided in favour of VPSB. This investment may also be in breach of s. 4(1) of the Trustee Act 1949.

The Constructive Trust Sum

[26] The 1st defendant's statement to the R&M contradicts the Malaysiakini article dated 9 July 2004. The defendants refused to disclose a statement of account which was purportedly given to the police. Hindered by the defendant's non-cooperation and the lack of concrete information the R&M has been unsuccessful in securing custody, control and possession of the Constructive Trust sum. This sum remains in jeopardy.

Non-cooperation And Retaliation

[27] The R&M have been given the run-around by the defendants in their endeavour to obtain and secure the trust property. When contacted the 1st defendant said that he did not have any of the books and records of the Trust; the documents were in the custody of one Hamzah of Kota Tinggi. The 1st defendant said that he did not have Hamzah's phone number. Later he said that he was unable to contact Hamzah as the phone reception in the area was bad. When the R&M went to Hamzah's house in Petrijaya, they found the 1st defendant's son, Dinesh Kanawagi present. Hamzah told the R&M that the books and records were not with him; that he could not remember, he was uncertain and that the books and records may be in Petaling Jaya where he lived with his children. When Hamzah was told that the 1st defendant said that the books and trust records were with Hamzah, Dinesh Kanawagi who was present said he had no knowledge of such statement. However, when the 1st defendant made the statement to the R&M, Dinesh was seated next to the 1st defendant. When the R&M asked Dinesh for the 1st defendant's phone number, Dinesh said that he did not have his father's telephone number.

[28] Subsequently on 24 April 2009 the 1st defendant informed the R&M that the accounts of the trust was handled by one K Siva Lingam. When contacted K Siva Lingam informed that he did not have any books, records or documents of the trust and that he worked for TCMK Associated who did the audit. TCMK Associated's role was not disclosed to the R&M by the 1st defendant. When contacted TCMK Associated informed the R&M that they did not have any books or records of the trust and that the original ledger, payment vouchers and bank statements of the trust are with the trustees.

[29] The R&M have not received any documents from the defendants. All discoveries made by the R&M were made without any assistance from the defendants. The 1st defendant's excuse is that there was a fire at his office. The fire in May 2007, however, does not explain the total absence of the records for the rest of 2007, 2008 and early 2009. RM435,451.18 was withdrawn from the Agro Bank account between 12 May 2008 and 9 April 2009 with all the withdrawal slips signed by the 1st defendant and 2nd defendant. The 27 properties were purchased in 2008. Notwithstanding that

these are post-fire transactions no documents have been furnished by the defendants. However, on 13 August 2009 some documents have since emerged including a letter from ARB, resolutions of the trust, a letter to the Ketua Pengarah Jabatan Hal Ehwal Orang Asli and a reply thereto. This shows that the defendants are in possession of documents belonging to the trust but have clearly refused to hand them over to the R&M.

[30] The 1st defendant has continued to act in defiance of the R&M order. For example, on the return of the perfected deed of receipt and reassignment he states that 'my solicitors are pursuing the matter to ensure its completion as soon as possible'. He has given instructions to solicitors in respect of the 27 properties despite the fact that the R&M had been appointed (para. 31, defendant's affidavit in reply dated 13 August 2009.)

[31] Further the defendants have retaliated against those seeking to obtain and secure the trust property. The defendants filed a counter-claim against a number of parties – (i) G. Ragumaran, solicitors for the plaintiffs; (ii) Renu Zachariah & law firm, solicitors for the R&M; (iii) John Verghis, an agent of the R&M; (iv) Khoo Pek Lin and Folks Corporation of which the R&M is a director. The defendants have failed to obtain leave of the court to file the action against the R&M and his agents; the R&M being an officer of the court.

[32] In conclusion, all the above points to the mismanagement of the trust by the defendants. There is a lack of accountability and proper keeping of records. It appears that the trust has been run without any proper supervision and control. The situation is clearly undesirable as the trustees of a trust are acting in a fiduciary capacity. The conduct of the defendants in refusing to cooperate with the court appointed R&M is inexcusable. The trust is for the benefit of all the beneficiaries. In discharging their duties as trustees the defendants are bound by the high standards of duty of care. Plainly, this is not the case. They have engaged in self-dealing. On the whole of the evidence as adduced by the affidavits there is a real risk that the trust property is in jeopardy.